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No. 82-224

In the Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 3486, PETITIONER

v.

NEW JERSEY AIR NATIONAL GUARD, 177TH FIGHTER INTERCEPTOR GROUP AND UNITED STATES DEPARTMENT OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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The court of appeals held that proposals made by a union of technicians employed by the New Jersey Air National Guard, which would require the submission of personnel grievances to binding arbitration, are outside the National Guard's duty to bargain, because binding arbitration is prohibited by 32 U.S.C. 709(e) of the National Guard Technicians Act of 1968 ("Technician Act"). That provision states that "[n]otwithstanding any other provision of law," appeals by National Guard technicians of adverse personnel actions "shall not extend beyond the adjutant general" of the state. 32 U.S.C. 709(e)(5). Petitioner contends that this holding conflicts with provisions of the labor-management relations chapter of the Civil Service Reform Act of 1978, 5 U.S.C. (Supp. V) 7101 *et seq.* ("Labor-Management

Act"), that grant federal employee unions the right to negotiate for a grievance procedure culminating in binding arbitration (5 U.S.C. (Supp. V) 7121(a) and (b)) and provide that where such a procedure has been agreed upon, covered employees may elect to pursue grievances either through the negotiated procedure or through any appellate remedy provided by any "other personnel system[] applicable to [the] employees" (5 U.S.C. (Supp. V) 7121(e)(1)).[1]

Petitioner's contentions are incorrect for the reasons stated in the thorough opinion of the court of appeals, upon which we rely. Because there is no conflict among the circuits on this issue, this case does not warrant review in this Court.

1. In the course of collective bargaining between the New Jersey Air National Guard ("the Guard") and petitioner, a dispute arose concerning the negotiability of union proposals pertaining to adverse personnel actions and the processing of employee grievances.[2] The union proposals would

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[1]32 U.S.C. 709(e) is reproduced at Pet. App. 88a-89a. Pertinent provisions of the Labor-Management Act are reproduced at Pet. App. 77a-78a and Pet. App. 79a-80a.

[2]The union proposals at issue here state (Pet. App. 12a n.1):

Grievance Procedure

Section 4. An aggrieved employee affected by discrimination, removal, reduction in grade or pay based on an unacceptable performance or any other adverse action may raise the matter under any statutory appellant [sic] procedure or *with the concurrence of the union* under the negotiated procedure but not both; *except for a discrimination complaint which may be a mixed procedure and filed under both processes.*

Adverse Disciplinary Action

Section 4(b). The parties agree that the grievance procedure negotiated herein (Article XI) may be used to adjudicate any

have subjected grievances pertaining to layoffs and adverse personnel actions to procedures culminating in binding arbitration. When the Guard asserted that these proposals concerned matters that are non-negotiable, petitioner brought the matter before the Federal Labor Relations Authority ("FLRA")—the federal agency charged with implementing the Labor-Management Act and overseeing disputes between the federal government and its employees. With exceptions noted in the margin (see page 2, note 2, *supra*), the FLRA held the proposals to be within the Guard's duty to bargain and ordered the Guard to engage in collective bargaining over the disputed matters (Pet. App. 1a-8a).

Pursuant to 5 U.S.C. (Supp. V) 7123(a), the New Jersey Air National Guard and the United States Department of Defense filed a petition for review of the FLRA decision and order in the court of appeals. The FLRA filed a cross-petition for enforcement of its order and petitioner intervened in the action (Pet. App. 13a). The court of appeals granted the petition for review, set aside the decision of the FLRA, and denied its petition for cross-enforcement (*id.* at 9a-30a).

2. Petitioner's central contention (Pet. 11) is that the court of appeals' decision "through its interpretation of the National Guard Technician Act (32 U.S.C. 709(e)) eviscerates the later enacted 5 U.S.C. § 7121(e)" of the Labor-Management Act. But the court of appeals correctly concluded (Pet. App. 16a), that the plain language of the Technician Act, 32 U.S.C. 709(e), precludes bargaining

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misunderstanding or disagreement relating to "just cause" and what is considered "fair and equitable."

The Federal Labor Relations Authority held the italicized portions of the grievance procedure proposal to be non-negotiable. Petitioner did not seek review of that portion of the FLRA decision, and the correctness of this aspect of the FLRA decision is not at issue in this Court.

respecting the union's proposal. Accordingly, as the court below recognized (Pet. App. 27a), the question presented is whether Congress intended the provisions of the Labor-Management Act relied upon by petitioner to repeal by implication the clear prohibition in the Technician Act. The negative answer given that question by the court of appeals is powerfully supported by the many considerations adduced in the court's opinion.

First, contrary to the view of the FLRA (see Pet. App. 100a),[3] Section 709(e) absolutely precludes binding arbitration on personnel matters affecting national guard technicians and cannot be accommodated to application of the Labor-Management Act (see Pet. App. 21a-22a). Second, Section 709(e) expressly provides that its provisions are to operate "notwithstanding any other provision of law"; the pertinent provisions of the Labor-Management Act contain no similar statement.[4] Thus, the plain language of the two statutes dictates that the Technician Act is controlling (Pet. App. 22a-23a). Third, as the court of appeals noted (*id.* at 24a-26a), the legislative history of the Technician Act, a narrowly framed measure specifically designed to regulate comprehensively the status of National Guard technicians, shows that Congress regarded as of paramount importance

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[3]The FLRA's decision in this case (Pet. App. 1a-8a) relies (*id.* at 4a) upon the Authority's companion decision in *National Association of Government Employees, Local R12-132 and California National Guard*, 5 F.L.R.A. No. 25 (Feb. 20, 1981) (Pet. App. 91a-101a). A petition for review of the companion decision is pending in the Ninth Circuit together with a cross-petition for enforcement (*California National Guard* v. *FLRA*, Nos. 81-7231 & 81-7336).

[4]As the court of appeals noted (Pet. App. 13a), the National Guard is "something of a hybrid:" a unique entity that is an instrumentality of both state and federal government. It therefore is not surprising that a general statutory provision applicable to most civilian federal employees does not override the special provisions of federal law that govern the status of National Guard technicians and preserve the authority of state adjutants general.

the provisions of Section 709(e) barring interference through grievance procedures with the military authority of state adjutants general. By contrast, neither the language nor the legislative history of the Labor-Management Act, a statute broadly applicable to most federal civilian employees, reflects any awareness of the special situation of National Guard technicians, much less an intention to alter the carefully crafted rule established in 1968 by enactment of Section 709(e).

These factors, the court of appeals concluded (Pet. App. 28a-29a), make unusually appropriate application of this Court's teaching that "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum" (*Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976)). As the court explained (Pet. App. 29a-30a):

> It appears inconceivable that Congress in 1978, without a moment's thought as to the question of state control over the National Guard, or as to the needs of military discipline over Guard technicians in their dual status as civilian and military personnel, intended to eliminate, by mere implication, the controls that Congress carefully had imposed over those employees and deemed "essential" ten years earlier.
>
> Because such a conclusion appears unwarranted by anything contained in the statutes themselves or the legislative histories accompanying them, we must reject the position of the FLRA and hold that the provisions of section 709(e) of the Technician Act remain as exceptions to the terms of the Labor-Management Act. Only this reading of the two statutes successfully gives to both statutes the effect evidently intended by Congress * * *. Because we cannot apply those general provisions to Guard technicians without

> in effect repealing section 709(e) of the Technician Act, and because it is abundantly clear that Congress deemed section 709(e) to be of considerable importance to the proper functioning of the National Guard as a military unit under dual state-federal control, we hold that the requirements of section 7121 of the Labor-Management Act do not override the provisions of section 709(e) of the Technician Act. To do otherwise would permit a subtle subversion of a clear congressional intent.

Contrary to petitioner's suggestion, this reasoning does not render nugatory the provisions of the Labor-Management Act upon which petitioner relies. It merely limits their application to National Guard technicians—a tiny fraction of the federal workforce.[5]

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[5]Nothing in the legislative history of the Labor-Management Act suggests that 5 U.S.C. (Supp. V) 7121(e) was intended to override barriers, expressly created by narrowly focused statutes such as the Technician Act, to review of agency personnel decisions by arbitration or other negotiated grievance procedures. The language excerpted by petitioner (Pet. 8) from S. Rep. No. 95-969, 95th Cong., 2d Sess. 110 (1978), indicates only that Section 7121(e) provides an alternative to existing agency grievance procedures. It plainly does not indicate that statutes precluding review of personnel decisions are abrogated. Nor is there any merit to petitioner's suggestion that a casual reference in the quoted portion of the Senate Committee Report to "personnel systems * * * such as those provided in Title 38" supplies the necessary evidence of intent to repeal prior limits upon administrative review. First, there is no evidence whatever that Congress had in mind the disciplinary procedures for Veterans Administration medical personnel established by 38 U.S.C. 4110—the example singled out by petitioner. *A fortiori* the committee report reflects no intention to override the finality provision of 38 U.S.C. 4110(d) or, for that matter, any other limitation on review; that subject is not even mentioned. Finally, even if it could be assumed that the Labor Management Act authorizes an alternative grievance mechanism notwithstanding the finality provisions of 38 U.S.C. 4110(d), there would be no reason to conclude that the unique limitation upon review established by 32 U.S.C. 709(e), which places final authority in the hands of *state* officers, was similarly displaced (see page 4 note 4, *supra*).

3. Petitioner also contends that the FLRA's decision "should have been granted deference by the Court of Appeals" (Pet. 12). The court of appeals correctly observed, however, that because it was required to resolve an apparent conflict between the Labor-Management Act and the Technician Act and because the latter act is outside the FLRA's area of expertise, the court was "not obliged to defer to the FLRA's reading of the Technician Act, or to its resolution of the conflict between the two statutes" (Pet. App. 20a n.6).

Moreover, the question of statutory construction presented by petitioner is pending in three other courts of appeals: *California National Guard* v. *FLRA*, Nos. 81-7231 & 81-7336 (9th Cir.); *State of Nebraska Military Department, Office of the Adjutant General* v. *FLRA*, No. 82-1347 (8th Cir.); and *Indiana Air National Guard, Hulman Field, Terre Haute* v. *FLRA*, Nos. 82-1496 & 82-1544 (7th Cir.). There will be time enough for the Court to consider this question should a conflict among the circuits arise.[*]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
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[*]The Federal Labor Relations Authority believes that the court below erred insofar as it failed to defer to the agency's views. The FLRA agrees, however, that because of the absence of a conflict among the circuits certiorari is not warranted in this case. Should the instant petition nonetheless be granted the FLRA would seek to present its views in support of its decision before this Court.